Filed 9/30/19 P. v. Allen CA1/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CHARLES ALLEN, Defendant and Appellant.	A153134 (City & County of San Francisco Super. Ct. No. SCN226594)

A jury found Charles Allen guilty of two counts of attempted indecent exposure after he repeatedly masturbated on public sidewalks. He claims the trial court prejudicially erred by failing to sua sponte instruct the jury on the lesser uncharged offense of lewd conduct and by excluding impeachment evidence. He also asserts his lawyer was ineffective and that his trial suffered from prejudicial cumulative error. His claims are meritless. We affirm.

BACKGROUND

The following is a brief overview of the facts, which we will provide in greater detail in our discussion of the specific issues raised in this appeal.

Around 4:00 p.m. on September 30, 2016, San Francisco police officers were called to the corner of Ninth Avenue and Geary Boulevard in response to a report of a large naked man masturbating in a doorway across the street from a school. Allen was detained at the scene but not arrested because the complaining witness refused to meet with the police. About an hour later, police received a second call reporting a man with his pants pulled down sitting outside of an apartment, staring into the window and

masturbating. A mother was playing with her young children next to her front window when she saw Allen masturbating and closed the blinds. Allen pulled his pants up and walked away toward the corner of Masonic and Geary.

Shortly afterward the woman's husband returned home, heard what had happened from his wife and son, and set out to find Allen. As he passed a small alley off of Geary Boulevard next to the Ro Café, he spotted Allen four or five feet back from and facing the sidewalk. Allen was masturbating in the alley with his pants down around his knees. The café's only entrance is from the alley, about 10 feet in from the sidewalk. The husband called the police.

Allen was arrested and charged with two counts of indecent exposure with three prior indecent exposure convictions. The information also alleged three prior strike convictions and four prior prison terms. A jury acquitted Allen of indecent exposure but found him guilty of two lesser charges of attempted indecent exposure with priors. The prison priors and one prior strike conviction were found true. He was sentenced to a prison term of five years and eight months. Allen timely appealed.

DISCUSSION

I. Jury Instructions

Allen contends the trial court had a sua sponte duty to instruct the jury on misdemeanor lewd conduct (§ 647, subd. (a))[1] because evidence introduced at the preliminary hearing established lewd conduct as a lesser included offense of indecent exposure (§ 314, subd. (1)). He is mistaken.

A trial court must instruct the jury sua sponte on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant committed the lesser offense but not the greater. (*People v. Macias* (2018) 26 Cal.App.5th 957, 961 (*Macias*).) " '[A] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be

[1] Further statutory citations are to the Penal Code unless otherwise noted.

committed without also committing the lesser.' " (*People v. Licas* (2007) 41 Cal.4th 362, 366 (*Licas*).) "If a lesser offense shares some common elements with the greater offense, or if it arises out of the same criminal course of conduct as the greater offense, but it has one or more elements that are not elements of the greater offense as alleged, then it is a lesser related offense, not a necessarily included offense." (*People v. Hicks* (2017) 4 Cal.5th 203, 209); see *People v. Hall* (2011) 200 Cal.App.4th 778, 781 [" '[a] defendant has no right to instructions on lesser related offenses' "].) " 'We apply the independent or de novo standard of review to the failure by the trial court to instruct on an assertedly lesser included offense.' " (*Licas*, *supra*, at p. 366.)

"To determine if an offense is lesser and necessarily included in another offense . . . , we apply either the elements test or the accusatory pleading test." (*People v. Shockley* (2013) 58 Cal.4th 400, 404.) "The elements test is satisfied if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, such that all legal elements of the lesser offense are also elements of the greater. [Citation.] . . . Under the accusatory pleading test, a lesser offense is included within the greater charged offense if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense." (*People v. Bailey* (2012) 54 Cal.4th 740, 748.)

Allen acknowledges, correctly, that lewd conduct is not a lesser included offense of indecent exposure under the statutory elements test. (See *People v. Meeker* (1989) 208 Cal.App.3d 358, 361-362 [lewd conduct requires touching, which is not an element of indecent exposure] (*Meeker*).) He also acknowledges that the information in this case essentially mirrored the language of section 314, subdivision (1) and did not allege touching. Hence, lewd conduct was not by any traditional application of the elements or accusatory pleading tests a lesser included offense of the indecent exposure charges against Allen.

Allen's argument, rather, is premised on an "expanded accusatory pleading test" that would include consideration of evidence at the preliminary hearing. In *People v. Ortega* (2015) 240 Cal.App.4th 956 (*Ortega*), which Allen urges us to follow, the court formulated this revision of the accusatory pleading test and held "[t]he evidence adduced

at the preliminary hearing must be considered in applying the accusatory pleading test when the specific conduct supporting a holding order establishes that the charged offense necessarily encompasses a lesser offense." (*Id.* at p. 967.)

We decline to apply this "expanded" test. *Ortega* is inconsistent with the Supreme Court's decision in *People v. Montoya* (2004) 33 Cal.4th 1031 (*Montoya*), which requires courts to "consider only the [accusatory] pleading" in determining whether a charged offense includes a lesser included offense under the accusatory pleading test. (*Id*. at p. 1036, italics omitted.) As stated in *People v. Munoz* (2019) 31 Cal.App.5th 143 (*Munoz*), "The Supreme Court has indicated repeatedly . . . that when applying the accusatory pleading test to determine whether one offense is necessarily included in another, courts do not look to evidence beyond the actual pleading and its allegations regarding the purported greater offense." (*Id*. at p. 156; see *People v. Banks* (2014) 59 Cal.4th 1113, 1160, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3 [" '[t]he trial court need only examine the accusatory pleading' "]; *People v. Smith* (2013) 57 Cal.4th 232, 244 [same]; *People v. Chaney* (2005) 131 Cal.App.4th 253, 257 [" 'to determine whether a defendant is entitled to instruction on a lesser uncharged offense—we consider *only* the pleading for the greater offense' "].) Indeed, the Supreme Court in both *Montoya* and *People v. Ortega* (*Ernesto*) (1998) 19 Cal.4th 686, 697-698 (*Ortega* (*Ernesto*)) expressly rejected the analysis of lesser included offenses employed in *People v. Rush* (1993) 16 Cal.App.4th 20 (*Rush*), which considered evidence at the preliminary hearing in applying the accusatory pleading test. (*Montoya*, at p. 1036, fn. 4; see *Rush* at p. 27.)

Significantly, *Ortega* does not discuss or distinguish *Montoya* or *Ortega* (*Ernesto*). Nor does it address the Court's consideration in *Ortega* (*Ernesto*) of the practical reasons for limiting the assessment of lesser included offenses to the elements and pleadings. "Basing the determination of whether an offense is necessarily included within another offense solely upon the elements of the offenses and the language of the accusatory pleading promotes consistency in application of the rule precluding multiple convictions of necessarily included offenses, and eases the burden on both the trial courts

and the reviewing courts in applying that rule. Basing this determination upon the evidence would require trial courts to consider whether the particular manner in which the charged offense allegedly was committed created a sua sponte duty to instruct that the defendant also may have committed some other offense. In order to determine whether the trial court proceeded correctly, a reviewing court, in turn, would be required to scour the record to determine which additional offenses are established by the evidence underlying the charged offenses, rather than to look simply to the elements of the offenses and the language of the accusatory pleading." (*Ortega* (*Ernesto*), *supra*, 19 Cal.4th at p. 698.)

Published cases since *Ortega* have uniformly declined to follow it and to instead apply the accusatory pleading test without regard to evidence from the preliminary hearing. (See, e.g., *People v. Alvarez* (2019) 32 Cal.App.5th 781, 787-790; *Munoz*, *supra*, 31 CalApp.5th at pp. 157-158; *Macias*, *supra*, 26 Cal.App.5th at pp. 963-965.) Properly so. Binding Supreme Court authority makes clear that we may not look beyond the language of the accusatory pleading itself in assessing lesser included offenses (*Auto Equity Sales, Inc. v. Superior* Court (1962) 57 Cal.2d 450, 455), and the practical ramifications of the "expanded" rule make clear that, even if we could, we should not. We follow the Supreme Court's decision in *Montoya* and join those courts that have refused to apply *Ortega*'s expanded accusatory pleading test.

II. Exclusion of Impeachment Evidence

Allen contends the court committed prejudicial error and violated his constitutional rights when it excluded defense impeachment evidence. It did not.

A. Background

1. The testimony

A Delta airlines employee testified about one of Allen's prior indecent exposure convictions. On July 7, 2010, she finished her shift at San Francisco International Airport between 1:00 and 1:45 a.m. It was too early for BART trains to run, so she took a nap in a restaurant booth in the international terminal until she could leave for home. As she began to doze off she felt someone looking at her. She opened her eyes and saw

Allen standing above her. He asked whether she had an extra blanket. She said no. Allen walked around to the other side of the employee's booth and lay down on the bench opposite her, where he turned toward her, undid his belt, pulled out his erect penis and masturbated.

The employee grabbed her belongings and moved across the restaurant to sit next to another couple, but Allen followed, approached the couple's table and again started masturbating. The employee called the police. Allen was convicted of indecent exposure in relation to this incident.

2. Proposed Impeachment Evidence

The Delta employee was the prosecution's final witness. The morning she was to testify the prosecutor learned she had a 2009 arrest for misdemeanor domestic violence and sexual battery. No charges were filed as a result of the arrest. The prosecutor informed defense counsel about the arrest and gave her the police report.

Defense counsel moved to use the police report for impeachment purposes "as a prior bad act." The prosecutor argued the report was inadmissible under Evidence Code sections 787 and 352. The court excluded the report. It explained: "I think I have sufficient information to make a determination as to whether or not it would be admissible.

"Number one, it's just simply an arrest. You have to prove it up. In order to prove it up you would then have to, [defense counsel], prove it up with witnesses. So, the question then becomes one of whether or not it's a 352 issue. And the 352 issue would determine whether or not the proffered evidence is probative and prejudicial or whether or not there is a tendency to confuse the issues and extend the time that you would be in trial.

"Since you were just apprised of this, you have not had enough opportunity to investigate, go out and find additional witnesses that you would need to summon.

"And also, I have to determine whether or not, even assuming that you had all that information and you were ready to go, whether or not it logically tends to be a reasonable

inference to prove the issue for which it is offered, i.e., credibility. And whether or not it's ultimately material to the parties in this case, meaning your case.

"So if that's the only argument that's what you want to do, given the state of the evidence and where we are, the Court's going to deny your request at this time as the Court doesn't find there's probative value in this matter. And so therefore your request will be denied."

3. Analysis

A court has " 'broad discretion' under Evidence Code section 352 'to exclude even relevant evidence "if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." ' " (*People v. Merriman* (2014) 60 Cal.4th 1, 60.) "An appellate court reviews a court's rulings regarding relevancy and admissibility under Evidence Code section 352 for abuse of discretion. [Citation.] We will not reverse a court's ruling on such matters unless it is shown ' "the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." [Citation.]' " (*Id*. at p. 74; see *People v. Vargas* (2001) 91 Cal.App.4th 506, 545, 543 [trial courts "have wide discretion in determining the relevancy of evidence"; no abuse of discretion under Evidence Code, section 352 unless court " ' "exceeds the bounds of reason, all of the circumstances being considered" ' "].)

Allen asserts the court did not perform an analysis under Evidence Code section 352, but rather excluded the evidence of the employee's 2009 arrest solely because it lacked probative value. Thus, he argues, "if the witness's prior actions had probative value to diminish her credibility, the trial court erred in excluding the evidence." He misreads the record. As the Supreme Court has repeatedly held, "a court need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing functions under Evidence Code section 352. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1169; *People v. Riel* (2000) 22 Cal.4th 1153, 1187-1188; *People v. Carpenter* (1999) 21

Cal.4th 1016, 1053; *People v. Box* (2000) 23 Cal.4th 1153, 1200, disapproved on another point in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10.)

That is the case here. The court's comments, taken as a whole, plainly show it was aware of and performed its balancing analysis under Evidence Code section 352. Moreover, given the tangential nature of the proposed impeachment evidence, the stage of the trial and the delays that would be required for defense counsel to investigate and summon witnesses, the court's decision to exclude an eight-year-old arrest for an uncharged domestic violence incident was well within its discretion and did not violate Allen's constitutional rights (see, e.g., *People v. Abilez* (2007) 41 Cal.4th 472, 503 [discretionary evidentiary ruling did not violate right to present a defense]; *People v. Gurule* (2002) 28 Cal.4th 557, 620 [ordinary rules of evidence generally do not infringe on the right to present a defense; argument that restricted cross-examination violated rights to confrontation, due process, and a fair trial rejected]; *People v. Cunningham* (2001) 25 Cal.4th 926, 999 [exclusion of defense evidence on a subsidiary point is not a deprivation of due process].)

III. Ineffective Assistance of Counsel

Allen contends his attorney provided constitutionally ineffective assistance by failing to request instructions on misdemeanor lewd conduct as a lesser included offense of indecent exposure. As established above, lewd conduct is not a lesser included offense of indecent exposure. (*Meeker*, *supra*, 208 Cal.App.3d at p. 362.) Assuming Allen asserts his attorney should nonetheless have asked the court to instruct on lewd conduct as an alternative to felony indecent exposure, his assertion is unpersuasive.

"To establish constitutionally inadequate representation, a defendant must demonstrate that (1) counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's representation subjected the defendant to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. [Citations.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 845.) "If a defendant has failed to show that the challenged actions of counsel were prejudicial, a

reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient." (*People v. Kipp* (1998) 18 Cal.4th 349, 366.)

We do so here, because Allen cannot show a reasonable probability the jury would have convicted him only of lewd conduct had it been instructed on that offense. The significant difference between the two crimes lies in the required intent. " 'Generally, a conviction for indecent exposure requires proof of two elements: "(1) the defendant must willfully and lewdly expose the private parts of his person; and (2) such exposure must be committed in a public place or in a place where there are present other persons to be offended or annoyed thereby." [Citation.]' [Citation.] The Supreme Court has construed *willful* and *lewd* exposure of private parts to mean 'that the actor not only meant to expose himself, *but intended by his conduct to direct public attention to his genitals for purposes of sexual arousal, gratification, or affront*.' [Citation, italics added.] [¶] The nature of the specific intent required for indecent exposure, then, is quite distinct from that involved in lewd conduct. A person who exposes his private parts with the intent 'to direct public attention to his genitals' is necessarily engaged in a purposeful and aggressive sexual display designed to provoke others. In contrast, lewd conduct can be committed by one who blithely ignores the risk of being seen and acts *despite* the presence of others, rather than because of it." (*People v. Honan* (2010) 186 Cal.App.4th 175, 181-182 (*Honan*).)

In this case there was overwhelming evidence that Allen intended to direct public attention to his genitals, and the contrary evidence—consisting solely of his testimony—was notably implausible. In broad daylight, Allen sat on a public sidewalk directly across from a family's first floor flat with a direct view through a floor-to-ceiling window. A mother was standing inside right next to the window. Allen's pants were around his ankles as he moved his hand up and down his exposed penis. As the mother pulled the blinds shut Allen looked up at her, waved and made eye contact while continuing to masturbate. He knew there was nothing blocking her view of him and he made no effort to cover his exposed penis.

Allen ultimately left because, "if they were pissed off good chance they'll call the cops." He walked north to Geary Boulevard and then East toward Masonic until he spotted a public alley next to the Ro Café. Allen stopped in the alley four or five feet in from and facing Geary Boulevard. It was still bright daylight and traffic on Geary was bumper to bumper. Allen stood directly in front of the café's entrance and masturbated with his penis exposed, again making no effort to conceal himself. When a young woman walked into the alley Allen made eye contact with her before she immediately "did a 180 and walked out." Asked by defense counsel whether he "want[ed] anyone to see that he [was] masturbating" on the public sidewalk and in the alley next to the café, he answered "Yes."

Allen's prior convictions for indecent exposure were also strong evidence that he sought attention from others when he masturbated in public. In 2008 an unidentified individual called 911 and reported that Allen was "right across the street from Newcomer High School . . . exposing himself and jerking off right . . . in front of the kids." In March 2009, Allen pleaded guilty to indecent exposure, apparently in relation to this incident. In April 2009, Allen pleaded guilty to the same offense after he exposed his penis and publicly masturbated on a BART train.

In 2010 Allen was convicted of indecent exposure based on the incident with the Delta employee at the San Francisco Airport. As noted in our discussion of the jury instruction issue, he approached the employee in the airport, lay down on the bench opposite from where she was napping in a restaurant booth, exposed himself to her and masturbated. When she moved away Allen approached a couple seated in the restaurant and masturbated as he stood in front of their table. Finally, on September 30, 2016, just an hour before the mother on called 911 to report Allen masturbating outside her window, another complainant reported "a large, naked, African-American man sitting masturbating in the building across the street from a school" on the corner of Ninth Avenue and Geary Boulevard.

Allen testified, albeit not consistently, that he did not want anyone to see him masturbating and therefore chose secluded spots to engage in his proclivity. There were

never pedestrians present when he masturbated on public streets. He did not choose more secluded spots to masturbate because "I don't know San Francisco that good." Allen explained to the female prosecutor that he did not cover his penis while he masturbated in public because "I don't want any obstructions. I don't want nothing covering me while I masturbate. Man thing. You probably wouldn't understand."

It defies credulity that Allen would repeatedly masturbate in populated areas and in direct view of passersby, including schoolchildren, yet lack the intent to be seen while masturbating. Notwithstanding his testimony to that effect, the evidence that he purposefully masturbated where people would see him on September 30, 2016, and in the many prior incidents was overwhelming. On this record there is no probability a jury instructed on lewd behavior would have found he lacked the specific intent to "direct public attention to his genitals for purposes of sexual arousal, gratification, or affront" (*Honan, supra*, 186 Cal.App.4th at pp. 181-182) and therefore convict him only of that offense.

Nor can Allen demonstrate his attorney was ineffective for failing to more strongly advocate for the admission of the Delta employee's arrest record. Counsel sought to introduce the record as impeachment evidence. The court considered the request and gave a reasoned explanation of its discretionary decision to deny it. "Counsel is not ineffective for failing to make frivolous or futile motions." (*People v. Thompson* (2010) 49 Cal.4th 79, 122.) Nor has Allen shown that a more forceful argument would have changed the trial court's mind. No ineffective assistance of counsel is shown.

IV. Cumulative Error

Allen argues the cumulative effect of the alleged errors requires reversal of the judgment. We have rejected his allegations of error. Allen was entitled to a trial "in which his guilt or innocence was fairly adjudicated." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) He received such a trial.

DISPOSITION

The judgment is affirmed.

_____
Siggins, P.J.

WE CONCUR:

_____
Fujisaki, J.

_____
Wick, J.*

* Judge of the Superior Court of Sonoma County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.